(1) Supreme Court

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT RICHARDSON, PETITIONER

VS.

ALBERTSON'S INC.
A DELAWARE CORPORATION;
JAMES A. HAUTZINGER;
PAT HILDEBRAND;
FRANK S. FELDMAN, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ROBERT RICHARDSON
8285 Camfield Circle
Colorado Springs, Colorado 80920-7026
Home: (719)282-1577 or Cell: (719)229-2657

51pp

QUESTIONS PRESENTED

1. Whether there is a cause of action for perjury in a civil case under 28 U.S.C. §1746 and 18 U.S.C. §1621 or §1623? What is the statute of limitation on perjury under 28 U.S.C. §1746 and 18 U.S.C. §1621?

2. Whether when a person or company convicted under 28 U.S.C. §1746 or 18 U.S.C. §1621 or §1623 can the decision of the case in which perjury was committed be reversed, and how much damage could be paid to petitioners?

TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction of This Court	1
Statutory Provision at Issue	1
Statement of the Case	2
Statement of Facts	3
Opening Argument	5
I & II Statement of the Facts Relevant to the Issues Presented for Review	6
Supported Argument	9
The Fact That the Lower Court is in Conflict With the Acts of Congress	11
Closing Arguments	11
II Argument	12
III Argument	13
Constitutional and Staturoty Provisions Involved	14
Reasons for Granting the Writ	15

Page

Conclusion..... 16

INDEX TO APPENDICES

Tenth Circuit Appeal..... A1

District Court Decision..... A5

Denial of the Rehearing..... A9

Pretrial Order.....A10

TABLE OF AUTHORITIES CITED

Case Authorities

Robinson v. Missouri Pacific
Transportation Company
85F Supp. 235 (1949 D.C. Ark)..... 7

Gomer-Vigil
929F2D254 (6th as 1991) 8

Morgan V. Graham
228F.2D 625 34 ALRR2d 11..... 8

Carter v. Clark
(Cited as 616F2D 228[1980])..... 9

Page

Statutory Authorities

28 U.S.C. §1254..... 1,2

28 U.S.C. §1746..... 1,2,3
4,5,7,8,9
10,11,12,13,14,16

18 U.S.C. §1621.....11,13,14

18 U.S.C. §1623.....7,10,11

42 U.S.C.A. 1983..... 5

28 U.S.C.A. 2017..... 9

28 U.S.C.A. 144 and 455..... 11

28 U.S.C.A. 636(B)(1)(A)..... 11,13

Rule Authorities

Federal Rule Civil Procedure 56.(C) and (D).....3,4,10
Federal Rule Civil Procedure 72 (A) and (B) 11,12
Federal Rule Civil Procedure 16 (B) 6
Federal Rule Civil Procedure 26.....11,12

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported as follows: This order and judgment is not a binding precedent, except under the doctrines of law of the case, *res judicata*, and *collateral estoppel*. The court generally disfavors the Citation of orders and judgments; nevertheless, an order and a judgment may be cited under the terms and conditions of 10th Cir. R.36.3 (see Appendix).

JURISDICTION OF THIS COURT

The judgment below was entered on January 5, 1999, app. 1A, rehearing was denied on January 28, 1999, app. a. This court has jurisdiction to issue the writ of certiorari under 28 U.S.C. §1254.

STATUTORY PROVISIONS AT ISSUE

28 U.S.C. §1746 unsworn declaration under penalty of perjury.

Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed

by him, as true under penalty of perjury, and dated, in substantially the following form;

(1) If executed within the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date)
(signature)"

(2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify or state) under penalty of perjury that the foregoing is true and correct. Executed on (date)
(signature)"

STATEMENT OF THE CASE

The petitioner did file a case under 28 U.S.C. §1746 against the respondents in Richardson vs. Albertson's Inc., a Delaware Corporation, James E. Hautzinger, Pat Hildebrand, and Frank S. Feldman in Case No. 98-Z-1 in District Court. The United States Court of Appeals for the Tenth Circuit affirmed (98-1198) the decision of the United States District Court of Colorado. The Court of the United States District of Colorado and the U.S. Court of Appeals for the Tenth Circuit have overlooked the Constitution of the United States. The Courts have overlooked an Act of Congress. The case is under 28 U.S.C. §1746, wherein the statue was passed by Congress and signed into law by the President in 1976 (28 U.S.C. §1746).

The Court has stated that there is no course of action for perjury in a civil action under 28 U.S.C. §1746, which is an unsworn declaration penalty of perjury. The respondents did lie when they stated in their brief that the respondents met all the requirements under Rule 56 (c) and (d). The motion for the summary judgment was not fully adjudicated because there were ten (10) witnesses never examined by the respondents in the case, and there were also twenty-two (22) pieces of material on file that were never examined or addressed in this case (see Appendix). The respondents never answered any of the allegations that the petitioner put before the Court.

The Court never had a motion hearing in any of the cases that the petitioner filed in court. The Court has dismissed all the cases with no hearing. The petitioner filed the perjury charge. The petitioner filed the perjury charge against the respondents that they did use false "materiality" in their brief for motion for a summary judgment. The petitioner is asking that the Supreme Court of the United States grant a writ of certiorari in this case because there is a question of a constitutional act of Congress, and the public interest is drawn into question when there is no cause of action for perjury in a civil case. This is in conflict with acts of Congress, and a violation of the Constitution of the United States.

STATEMENT OF FACTS

On January 16, 1996 the District Court for the District of Colorado granted a summary judgment to respondent under (Rule 56). The petition appeals to the Tenth Circuit which the court affirmed the District Court of

Colorado on July 29, 1996 and the Supreme Court of the United States denied on April 28, 1997.

The petitioner filed a new complaint on January 2, 1998 against the respondents and other under 18U.S.C. §1746 which Richardson vs. Albertson's Inc., a Delaware Corporation, James E. Hautzinger, Pat Hildebrand and Frank S. Feldman in Case no. 98-Z-1 in District Court of Colorado. The petitioner filed under 28 U.S.A. 1746 which the respondents had lied on the statement which supported the brief that the court granted a summary judgment in favor of the respondents. The respondent's brief was theory of law, not the facts of the case. The theory of law can be true until it is proven to be true, so under this fact the respondents did lie, because respondents did prove his theory when he did not depose the ten (10) witnesses or examine or address the twenty-two (22) pieces of material on the petitioner's side. Under Rule 56 (c), case not fully adjudicated on motion; if a motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleading and the evidence before it, and by interrogating counsel, shall, if practicable, ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall substantiate controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action, the facts so specified shall be deemed established and the trial shall be conducted accordingly. The respondent did lie to the court; when the petitioner answered the interrogatories he gave statement about his

disability and how the company was discriminating against the petitioner at Albertson's. When the respondent took the petitioner's deposition, their question about his disability and how the respondent was discriminated against, the petitioner and other blacks in the company. When the respondents stated in their Brief that the petitioner was not asthmatic it was a lie because on file there was patient evaluation of the petitioner by S. Kent Olvey, M.D., p.m. (see A). The small materiality that respondent Frank S. Feldman had at the EEOC, but dismissed ADA (disability) complaint against respondents.

OPENING ARGUMENT

Appellant Robert Richardson filed a complaint against appellee Albertson's Inc. A Delaware Corporation, James A. Hautzinger, Pat Hildebrand and Frank S. Feldman under the district jurisdiction of this action pursuant to the 28 U.S.C.A. 1746 and 42 U.S.C.A. 1983. The appellee whoever knowingly by and fraudulently makes a false declaration certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States code, in or in relation to any case under title 11; or in the case Robert Richardson v. Albertson's Inc. a Delaware Corporation and a summary judgment granted in favor of the defendant in the case Robert Richardson v. Albertson's (94-B-1774). The district dismissal case Robert Richardson (Appellant) v. Albertson's Inc. A Delaware Corporation, James E. Hautzinger, Pat Hildebrand, and Frank S. Feldman for not stating a claim and does not appear that an implied right of action exists under 1746.

I. STATEMENT OF THE FACT RELEVANT TO THE ISSUE PRESENTED FOR REVIEW

A. The facts that the court had set this case (98-Z-1) pursuant to 28 U.S.C. 636 (B)(1)(A) and (B) and Fed. R. Civ. P. 72 (A) and (B) it is. The judge gave orders that Magistrate Judge Patricia A. Coan is designated to conduct proceedings in this action as follows, the court has violated their own Rule 636 and 72.

B. The fact that the court never made respondents answer the allegation that the petitioner complaint in district court. The court never followed their own proceeding in this civil action.

C. The district court never answered all the motions of the appellant or determined pretrial matters, including discovery and other non-dispositive motions.

D. The court did violate its own proceeding by not using Fed. R. Civ. P. 16(B) and D.C. Colo. 2 R 19.1.

II. STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

A. The court stated that it appears to the court that the Petitioner's complaint is that this action is without reasonable factual or legal basis, and therefore is repetitious and frivolous, although it may not be malicious.

1. The court never looked at perjury generally, which states under (2) in any declaration certificate,

verification or statement under penalty of perjury as permitted under section 1746 of title 28, United States code, willfully subscribed as true any material matter which he does not know to be true:

2. Is guilty of perjury and shall expect as otherwise expresses provided by law, be fined not more than $2,000.00 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

B. The court never looked at 28 U.S.A.C. 1746 when the court dismissed the complaint with prejudice, it is, and there was not cause for action.

1. There is cause of action under perjury generally in (VI) collateral consequence of conviction. The civil action for damages under Robinson v. Missouri Pacific Transportation Co. (1949 D.C. Ark) 85F Supp 235, plaintiff may recover for damage suffered through employment discharge following hearing in which defendants submitted false and perjury as such, it would lie when perjury was merely part of larger damaging conspiracy.

2. Under section 1746 of title 28, (see Gomer-Vigil as 929 F2D 254 [6th ar 1991] 18 U.S.C. 1623 pursuant to the incorporation by reference in section 1623 are must examine 28 U.S.C. §1746 unsworn declaration under penalty of perjury) to determine the parameters of 28 U.S.C. §1746 provides wherever under any law of the United States or under any rule, regulation, order or requirement made pursuant to law, any matter is required

or permitted to be supported, evidenced, established or proved by the sworn declaration verification, certificate, statement both or affidavit in writing of the person making the same (other than a deposition, or an oath of office or an oath required to be taken before a specified official other than a notary public) such matter may, with like force and effect, be supported evidence, established, or proved by the unsworn declaration certificate, verification, or statement in writing of such person which is subscribed by him as true under penalty of perjury, and dated... 28 U.S.C. §1746 (emphasis added) though Gomer-Vigil argues that 28 U.S.C. §1746 supports his position (Gomer-Vigil offers a narrow reading of the word "permitted") a less restrictive, and we believe correct, reading of section 1746 supports the government position. The constitution does not differ between civil court and criminal court. A person can yet perjure the court.

3. In civil action for damages for perjury, under Morgan v. Graham (1956 CAID Okla) 228 F2d 625, 54 ALR2d 1290, plaintiff was able to show damage to himself by reason of respondent's false representations, even though recovery would not lie simply for perjury which caused failure of plaintiff suit in which respondents had testified falsely.

C. The court dismissed for failure to state a claim. The claim was a perjury in case Richardson v. Albertson's (case 94-B-1774) and the appellant asked for relief on case 94-B-1774).

1. The court never used any federal civil procedure to dismiss for failure to state a claim. The

court had to prove that the petitioner could not prove and the respondents never answered allegations set forth in the complaint against them. The court or respondents never defeated the allegations of perjury.

SUPPORTED ARGUMENT

Concerning the fact that the Supreme Court of the United States used 28 U.S.C. §1746 in affidavit or declaration in support of a motion when there is no notarization being used, in the case of Carter v. Clark (cited as 616 f.2d 228 [1980]) it states: The Supreme Court and all courts established by the act of congress may,k from time to time, prescribe rules for the conduct of their business. Such rules shall be consistent with the acts of Congress and rules of practice and procedure prescribed by the Supreme Court.

It is clear from statute 28 U.S.C. §2017, that local courts may make local rules. It is equally clear, however, that such rules may not be in conflict with acts of Congress.

Section 1746 of Title 28, United States code, was passed in 1976 for the purpose of permitting the use, in Federal proceedings, of unsworn declaration given under penalty of perjury in lieu of affidavits H.R. Rep No.94-1616' 94th Cong., 2d Sess. 1, reprinted in 1976 U.S. Code Cong. & Admin. News, pp 5644, 5644. The only exception to the application of the statutes is that "Unsworn written declaration(s) given under penalty of perjury may not be substituted for (1) deposition(s), (2) an oath of office, or (3) a document required to be signed before a specified

individual other than a notary." (Id at 2 reprinted at [1976] U.S. Code Cong. & Admin. News, p. 5645)

When the attorneys gave the motion for a summary judgment under rule 56, that motion came under 28 U.S.C. 1746 which the Supreme Court used in the court for affidavit or declaration in the support of a motion. The respondents did lie on the motion for summary judgment under Rule 56(D). The motion for the summary judgment was fully adjudicated on the motion that appellees to the court were to state to the court that they had examined all the pleadings and the evidence before the court. The appellees never examined any pleading, testimony or affidavit from any witnesses, and never examined any of the witnesses on the appellant side. Therefore, the appellees did lie under 28 U.S.C. §1746, unsworn declaration under penalty of perjury, determination of material under 18 U.S.C.S. §1623 penalizing false material declarations before the Grand Jury or court. 60 ALR Fed 76. two-witness rule in perjury prosecution under 18 U.S.C. §1621. 49 ALR Fed 185. The appellees did give false materiality to the court on motion for summary judgment under Rule 56, so the court has to prosecute the appellees under rule of law which the appellees perjured themselves under the law and the statues of the law. The court must enforce the Constitutional law and rights when an appellant submits the charge in a court. That court must follow the law.

THE FACT THAT THE LOWER COURTS ARE IN CONFLICT WITH THE ACTS OF CONGRESS

This court is in conflict with Congress when it will not and does not enforce the Constitution or its statues or laws. The respondents have perjured themselves under the statute 28 U.S.C. §1746. Therefore, this lower court is in conflict with Congress and the Constitution, so I will appeal this case to the Supreme Court of the United States. I will argue the laws under the following statues: 28 U.S.C.§1746, 18 U.S.C.A §1621 & §1623, 28 U.S.C.S. §144 & §455. The lower court is in conflict with acts of Congress under 28 U.S.C. §1746 (see Addendum).

CLOSING ARGUMENTS

When the court dismissed the case (98-Z-1) based on the appellant's failure to state a claim, the court violated their own court rule 28 U.S.C. §636(B)(1)(A) and Fed. rule Civ. P. 72 (A) and (B). The court was pursuant to 28 U.S.C. 636 (B)(1)(A) and rule 72 (A)(B). Under 28 U.S.C. 636 (B)(1)(A), the court has the right to look at a criminal act of perjury which the appellant has charged the respondents in case Richardson vs. Albertson's (No. 94-B-1774). By the court pursuant under rule 636, it meant that the court can charge the appellee if appellant proved that respondents had perjured themselves under 28 U.S.C.S. §1746. Under the statutes of 636, the respondents must answer all the allegations to show the court that the respondents did not perjure themselves, which court was pursuant to rule 26 which states that respondents cannot just deny allegations, but must answer

the allegations by the respondents. Rule 26 is of criminal procedure in the taking of testimony. Rule 26 states in all trials the testimony of witnesses shall be taken orally in open court unless otherwise provided by an act of Congress or by these other rules: the Federal rule of evidence, or by other rules adopted by the Supreme Court. When the court dismissed the case 98-Z-1, it violated statutes 636 and rule 72 which would have allowed the appellant to provide his case at the trials, and the appellant could have given the documentary evidence under 28 U.S.C.S. §1746 to prove that the appellees did perjure themselves in case Richardson vs. Albertson's, (No. 94B-1774) by the court violating their own rule. The court, then, did make an error in dismissal of case 98-Z-1.

II. ARGUMENT

When the court dismissed case 98-Z-1, they failed to state a claim which relief can be granted. The court was pursuant under statutes 636 and rule 72. When the court violated their own rule and statutes by dismissal of the case for not stating a claim, it is a violation of the Constitution of the United States. The constitution does not give the court the power to dismiss a court case because of a claim that would be a violation of article 2, section 3 of the Constitution of the United States. The court used dead case's law in dismissing the case No. 98-Z-1.

III. ARGUMENT

When the court stated that no civil action for perjury exists, the court made an error. The civil cause of action for perjury exists pursuant to 28 U.S.C.S. §636. The petitioner filed a charge under 28 U.S.C.S.§1746 stating that the respondents have lied under penalty of perjury. The appellees lied on the support materiality that the court granted a summary judgment in favor of the appellees. When the appellees gave the support materiality to the court, they stated it was true under penalty of perjury, and penalty of perjury is a criminal act, but the respondents lied under penalty of perjury which is a criminal act. The civil action for perjury is prosecution under penalty of perjury:

> Whoever in any declaration, certification, verification or statement under penalty of perjury as permitted under section 1746 of title 28, United code, wilfully subscribes as true any material matter which they do not believe to be true:

is guilty of perjury and shall, except as otherwise expressly provided by the law, be fined not more than $2,000.00 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

Under the statutes 1746 or 1621, it did not state who could file a charge under statutes 1746 or 1621 and it did not state which court could not use the statues. However:

> Whomever having taken an oath before a competent tribunal officer, or person, in any case

> in which a law of the United States authorizes an oath to be administered that they will testify, declare, depose, or certify truly, or that any written testimony, declaration deposition or certification by them subscribed is true willfully and contrary to such oath states or subscribes any material matter which they do not believe to be true: (see Appendix)

The respondents have never answered any of the allegations in both cases 98-Z-1 or 98-B-1774. The respondents can not answer any of the allegations because the respondents have given false statement under penalty of perjury as in case Dickinsons vs. Wainwright. One who subscribes to false statement under penalty of perjury pursuant to 28 U.S.C. §1746 may be charged with perjury under 18 U.S.C.S. §1621, just as if the statement were made under oath, even though certificated oath may be defective.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitution was (28 U.S.C. §1746) provisions involved in this case. When the petitioner filed his case in the Court of the United States, the courts overlooked the Constitution of the United States. The Court has overlooked an act of Congress. The case is under 28 U.S.C. §1746 wherein the statute was passed by Congress and signed into law by the President in 1976 [28 U.S.C. §1746 (1976)]. The Court has stated that there is no cause of action for perjury in a civil case under 28 U.S.C. §1746, which states unsworn declarations are

under penalty of perjury. The Court states there is no cause of action for perjury in a civil case.

The respondents never answered any of the allegations that the petitioner put before the Court. The respondent never had a motion hearing in any of the cases that the petitioner filed in court. The Court has always dismissed all the cases without a hearing. The petitioner filed the perjury charge against the respondents because the respondents used false "material" in their motion for a summary judgment.

REASONS FOR GRANTING THE WRIT

The reason why the writ of certiorari should be granted is because the respondents did give false "materiality" to get the case dismissed in court. When respondents give false "materiality" to the court, that is a criminal act under the law. By granting the writ of certiorari, the Court can look at the criminal act the respondent did to the Court and to the petitioner. When the Court grants the writ of certiorari, it gives the petitioner his constitutional rights under the Constitution of the United States. Petitioner is asking that the writ of certiorari be granted.

CONCLUSION

The petition for a writ of certiorari should be granted because the respondent has committed perjury by giving the court false "materiality" under U.S.C. §1746.

Respectfully Submitted,

Robert Richardson

Date: 11 May, 1998

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ROBERT RICHARDSON, Plaintiff-Appellant, v. ALBERTSON'S INC., a Delaware Corporation; JAMES A. HAUTZINGER; PAT HILDEBRAND; FRANK S. FELDMAN, Defendants-Appellees.	No. 98-1198 (D.C. No. 98-Z-1) (D. Colo.)

ORDER AND JUDGMENT*

Before ANDERSON, KELLY, and LUCERO, Circuit Judges.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1 (G). The case is therefore ordered submitted without oral argument.

Plaintiff-appellant Robert Richardson brought suit in the district court claiming that Albertson's Inc., one of its employees, one of its attorneys, and an employee of the Equal Employment Opportunity Commission had violated his civil rights in a prior case arising out of the termination of his employment with Albertson's. He also asserted that the individual defendants had perjured themselves in that proceeding.

Construing Mr. Richardson's pro se pleadings liberally, see Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991), the district court concluded that he alleged a civil rights violation under 42 U.S.C. § 1983 and a private, civil action for perjury under 28 U.S.C. § 1746. It dismissed the complaint and cause of action with prejudice, under Fed. R. Civ. P. 12(b)(6).[1]

After a thorough review of the record, we agree with the district court that Mr. Richardson failed to allege that defendants acted under color of state law, as required

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[1] Additionally, the court determined that Mr. Richardson's complaint was repetitious and frivolous, warranting limited sanctions pursuant to Fed. R. Civ. P. 11. Mr. Richardson does not appeal this aspect of the court's order.

for his § 1983 claim. See Jojola v. Chavez, 55 F.3d 488, 492 (10th Cir. 1995). We also agree that Mr. Richardson has no civil action for perjury, because, in the absence of a statute to the contrary, an unsuccessful litigant may not maintain a civil action against a person who allegedly committed perjury. See Advantor Capital Corp. v. Yeary, 136 F.3d 1259, 1263 (10th Cir. 1998) (citing Morgan v. Graham, 228 F.2d 625, 627 (10th Cir. 1956)). We affirm for substantially the reasons expressed by the district court in its order of May 1, 1998.

At this time, we decline to impose sanctions and therefore deny appellees' motion for sanctions on appeal. We emphasize, however, that "[t]his court has the power to impose sanctions such as costs, attorney fees, and double costs for the filing of frivolous appeals." Van Sickle v. Holloway, 791 F.2d 1431, 1437 (10th Cir. 1985) (imposing double costs on a pro se litigant). Because Mr. Richardson's repetitive filings must come to an end,[2] we warn him that any additional frivolous and

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[2]This appeal is the fourth in a series of actions arising from the termination of Mr. Richardson's employment with Albertson's. See Richardson v. Bakery, Confectionary & Tobacco Workers Local No. 26, No. 98-1070, 1998 WL 514587 (10th Cir. Aug. 13, 1998) (affirming dismissal of civil rights action against Mr. Richardson's union, union officials, and attorney for the union); Richardson v. Albertson's, Inc., No. 96-1036, 1996 WL 421977 (10th Cir. July 29, 1996), cert. denied, 117 S. Ct. 1551 (1996) (affirming the district court's entry of summary judgment in favor of Albertson's on Title VII and ADA claims);

repetitious filings may result in the imposition of sanctions.

AFFIRMED. The mandate shall issue forthwith.

Entered for the Court

Stephen H. Anderson
Circuit Judge

Richardson v. Bakery, Confectionary & Tobacco Workers, Local No. 26, No. 95-1518, 1996 WL 422070 (10th Cir. July 29, 1996) (affirming the district court's entry of summary judgment in favor of the union on racial discrimination claims).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Zita L. Weinshienk

Civil Action No. 98-Z-1

ROBERT RICHARDSON,

Plaintiff,

v.

ALBERTSON'S, INC., a Delaware corporation, JAMES E. HAUTZINGER, PAT HILDEBRAND, and FRANK S. FELDMAN,

Defendants.

ORDER OF DISMISSAL

The matter before the Court is defendants' Motion To Dismiss For Failure To State A Claim, filed February 27, 1998. Plaintiff filed his Complaint *pro se* on January 2, 1998, which purportedly asserts claims under 28 U.S.C. § 1746[1] and 42 U.S.C. § 1983. Plaintiff was a former employee of Albertson's, Inc., and previously filed a federal lawsuit alleging unlawful termination. Plaintiff's lawsuit was dismissed and sustained on appeal. *See Richardson v. Albertson's, Inc.*, Civil Action No. 94-

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[1]Section 1746, entitled "Unsworn declarations under penalty of perjury," permits persons to make unsworn declarations under penalty of perjury in place of sworn declarations under oath.

B-1774 (D. Colo. Jan. 16, 1996), *aff'd*, 1996 WL 421977 (10th Cir. July 29, 1996), *cert denied*, 117 S.Ct. 1551 (April 28, 1997). Defendant James Hautzinger is one of the attorneys who represented Albertson's in the prior lawsuit. Defendant Pat Hildebrand is an employee of Albertson's who was a witness in the prior lawsuit. Defendant Frank Feldman is an employee for the Equal Employment Opportunity Commission (EEOC) who handled plaintiff's EEOC charge.

Plaintiff's Complaint and his response to defendants' Motion are difficult to decipher. Because plaintiff is proceeding *pro se*, the Court has construed his pleadings and papers more liberally and held them to a less stringent standard than formal pleadings and papers drafted by lawyers. *See Hall v. Belmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (citing *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972). However, the Court will not supply additional factual allegations to round out plaintiff's complaint or construct a legal theory on plaintiff's behalf. *See Whitney v. State of New Mexico*, 113 F.3d 1170, 1173-74 (10th Cir. 1997).

It appears that plaintiff is alleging that defendants' conduct in the prior lawsuit violated § 1746 and § 1983. Title 28 U.S.C. § 1746 does not expressly provide for a private right of action. Furthermore, it does not appear that an implied right of action exists under § 1746. *See Pelt v. State of Utah*, 104 F.3d 1534, 1541 (10th Cir. 1996) (setting forth four relevant factors for whether a private right of action should be implied from a federal

statute). Indeed, generally, there is no civil cause of action for perjury. *See Morgan v. Graham*, 228 F.2d 625, 627 (10th Cir. 1956). Therefore, plaintiff's allegations of perjury do not state a viable claim for relief.

For his claim under § 1983, plaintiff must allege that the defendants acted under color of state law. *See Pino v. Higgs*, 75 F.3d 1461, 1464 (10th Cir. 1996). This required element clearly is lacking as to defendants Albertson's, Hautzinger, and Hildebrand. *See Barnard v. Young*, 720 F.2d 1188, 1189 (10th Cir. 1983). Furthermore, § 1983 does not apply to the EEOC or Feldman, who are federal entities. *See Browns v. Mitchell*, 409 F.2d 593, 595 (10th Cir. 1969) ("42 U.S.C. § 1983 is concerned only with state action and does not concern itself with federal action."). Therefore, plaintiff's § 1983 claims must be dismissed.

In a prior related action, plaintiff was expressly warned by Judge Daniel B. Sparr that repetitious and malicious litigation may result in the imposition of sanctions. After careful consideration of plaintiff's filings in this and his prior related lawsuits, it appears to the Court that plaintiff's Complaint in this action is without any reasonable factual or legal basis and therefore is repetitious and frivolous, although it may not be malicious. Thus, because plaintiff has disregarded a prior warning by a judge of this Court on this matter, some limited sanctions pursuant to Fed. R. Civ. P. 11 and 28 U.S.C. § 1927 may be warranted. *See White v. General Motors Corp.* 908 F.2d 675, 680 (10th Cir. 1990).

In accordance with the foregoing, it is

ORDERED that defendants' Motion To Dismiss For Failure To State A Claim is granted. It is

FURTHER ORDERED that the Complaint and cause of action are dismissed with prejudice. It is

FURTHER ORDERED that Defendants' Motion For Sanctions Pursuant To Fed. R. Civ. P. 11 And 28 U.S.C. § 1927 is granted. Counsel for defendants Albertson's Inc., James Hautzinger, and Pat Hildebrand shall file an affidavit of reasonable attorneys fees spent defending this action on or before May 14, 1998, which the Court may consider as sanctions against plaintiff's frivolous lawsuit and to discourage the filing of future frivolous lawsuits. It is

FURTHER ORDERED that plaintiff may file a response to defendants' affidavit for attorneys fees on or before May 26, 1998. It is

FURTHER ORDERED that all other pending motions are moot.

DATED at Denver, Colorado, this 1 day of May, 1998.

BY THE COURT:

/s/

ZITA L. WEINSHIENK, Senior Judge
United States District Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ROBERT RICHARDSON,

Plaintiff-Appellant,

v.

ALBERTSON'S INC., a Delaware Corporation; JAMES A. HAUTZINGER; PAT HILDEBRAND; FRANK S. FELDMAN,

Defendants-Appellees.

No. 98-1198

ORDER

Filed January 28, 1999

Before **ANDERSON, KELLY,** and **LUCERO**, Circuit Judges.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 94-B-1774

ROBERT RICHARDSON,

Plaintiff,

vs.

ALBERTSON'S, INC., a Delaware corporation,

Defendant.

PRE-TRIAL ORDER

I. DATE AND APPEARANCES

The Pre-Trial Conference in this case is set for December 14, 1995, before Magistrate Judge O. Edward Schlatter. The attorneys appearing for the parties are as follows:

For the Plaintiff: Robert Richardson, pro se.

For the Defendant: James E. Hautzinger, Esq., Mark D. Williamson, Esq., Sherman & Howard L.L.C.

II. JURISDICTION

Plaintiff has brought these claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f), the Americans With Disabilities Act, 42 U.S.C. §

12111 et seq., and 28 U.S.C. § 1331. Defendant disputes whether this Court has jurisdiction over some or all of Plaintiff's claims.

III. CLAIMS AND DEFENSES

A. Plaintiff's claims:

Plaintiff is a black male citizen of the State of Colorado and resides in El Paso County. Defendant hired him on or about November 21, 1984 into a full-time position as a baker. During the course of his employment, Plaintiff was continually "written up" by his white supervisor for conduct that did not attract such measures when engaged in by white co-worker.

Plaintiff suffers from asthma. From time to time, Plaintiff experienced asthma attacks at work, at least in part because of the flour dust in the air. On or about June 2, 1992, Plaintiff left his work place at his lunch hour and did not return because of one of these attacks. He called to inform the bakery manager that he would not be returning that day. The next day, Plaintiff's wife called in to inform Defendant that Plaintiff was still too ill to return to work. When Plaintiff attempted to return on or about June 5, 1992, Defendant prevented him from doing so because he failed to produce a physician's statement verifying his illness. At this time Plaintiff had accrued 248 hours of sick leave. He also should have been allowed a 48-hour grace period within which to provide the statement pursuant to Defendant's policies. Under the same policies, Defendant refused to honor the Union Bargaining Contract as far as Arbitrating Plaintiff grievance. Defendant's refused to arbitrate the grievance that the Plaintiff filed with the Union to get Plaintiff reinstated after termination.

Plaintiff was placed on suspension and ultimately terminated. Similarly situated white employees were not disciplined as harshly as Plaintiff.

Plaintiff's Complaint alleges two claims for relief: race and color discrimination, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et seq. and 42 U.S.C. § 1981, and disability discrimination, in violation Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12111-12117. Plaintiff seeks lost wages and benefits, past and future, compensatory and punitive damages.

B. Defendant asserts the following defenses:

Defendant did not discriminate in any way against Plaintiff because of his race or alleged disability. Defendant's major defenses include the following: Plaintiff's discharge was not based on his race, color or disability; Plaintiff's Complaint fails to state a claim upon which relief can be granted; Plaintiff failed to exhaust administrative remedies; Plaintiff's claims are time barred; Plaintiff was not a "qualified individual with a disability" within the meaning of the Americans With Disabilities Act, 42 U.S.C. § 1211(8); Defendant's policies and practices regarding employee attendance and the verification of an employee's claimed illness are job related, consistent with business necessity, and non-discriminatory; Plaintiff did not request Defendant to make any accommodation for any alleged disability; acceptance of Plaintiff's poor attendance without verification of his claimed illness would have imposed an undue hardship on Defendant; and Plaintiff has failed to mitigate his damages, if any.

Plaintiff, an African-American male, worked for Albertson's from November 18, 1981, through

December 31, 1982, and from November 26, 1984, to his discharge, effective July 15, 1992. During his employment, he was a baker in Colorado Springs, Colorado.

Plaintiff's discharge specifically arose from the events of June 2-4, 1992. On June 2, 1992, Plaintiff left the store for his lunch break. During the lunch break, he telephoned his Bakery Manager, Jacque Johnson, and said that he had had a flat tire and would be late returning from lunch. Before Mr. Richardson returned, two officers from the El Paso County Sheriff's Office came to the store with a warrant for Plaintiffs arrest. The Store Director, Pat Hildebrand, told the officers that Plaintiff was at lunch, but said they were free to wait for his return. As reported to Hildebrand, the two officers were standing in the store's entrance with another Bakery Department employee, Willie Winters, when Plaintiff drove into the parking lot. Also as reported to Hildebrand, Plaintiff saw Winters and the two officers, sped off, and did not return to work that day.

Plaintiff called in sick and did not report to work on June 3, 1992. No information was provided regarding the nature of his illness.

As reported to Hildebrand, the following events occurred on June 4, 1992: Plaintiff appeared for work on June 4, 1992, at about 2:00 a.m. Before punching in, he saw Winters. This was the first time Winters had seen Plaintiff after he sped out of the parking lot on June 2, and Winters proceeded to question him about that event. Winters asked if Plaintiff had chosen not to return to work because he saw Winters and the two officers; Plaintiff acted as if he did not know what Winters was talking about. Winters asked Plaintiff if the

police officers were after him because he failed to make court appearances, and Plaintiff admitted that was the case. Plaintiff suddenly stated that he had to leave the store because he had something else to do; Winters said that he could not leave, because they were supposed to work. Plaintiff then told Winters to lie if anyone asked if he had seen him, and Plaintiff left the premises.

On June 5, 1992, Plaintiff was not scheduled to work, but came into the store to pick up his paycheck. He spoke with Hildebrand and said he had been ill on June 3 and 4, and had gone to the doctor on June 4. Hildebrand asked Plaintiff to produce a doctor's note, a prescription, a bill or receipt for the purchase of medication, or some other document verifying his story; Plaintiff said that he had none. Hildebrand specifically asked Plaintiff if he had come to the store on June 4, 1992, and Plaintiff unequivocally stated that he had not. Hildebrand then suspended Plaintiff, pending investigation.

Hildebrand discussed Plaintiff's suspension with Albertson's Labor Relations Department in Boise, Idaho. On June 25, 1992, Mike Schwarzkopf, Albertson's then Regional Director, Labor Relations, sent Plaintiff a letter setting froth the facts as Albertson's understood them, including Albertson's belief that Mr. Richardson had "most recently falsified the reasons for [his] absenteeism (and had in fact asked a fellow employee to lie for [him] to cover them up)...." Schwarzkopf requested Plaintiff to "provide any and all documentation you may have or may be able to obtain" that would disprove the facts as understood by Albertson's, and specifically asked Plaintiff to provide a written statement regarding the events of June 2-5, 1992. Schwarzkopf advised Plaintiff that Albertson's

intended to make a decision about his employment by July 15, 1992.

On July 15, 1992, Albertson's received from Plaintiff a one page, hand written letter along with a copy of page 9 of the applicable labor contract. In his letter, Plaintiff stated that this single page was the document requested by Schwarzkopf in the June 25 letter.

The information Plaintiff provided was not responsive to Schwarzkopf's requests. It provided absolutely no verification of Plaintiff's claimed illness on June 2, June 3, or June 4, 1992, or of his alleged doctor's visit. It did not disprove or even address the facts as Albertson's understood them. Plaintiff provided no further documentation to Albertson's.

Because Albertson's believed that Plaintiff failed to report for work as scheduled, failed to provide documentation verifying his alleged illness, and misrepresented the events of June 2-4, 1992, Albertson's terminated Plaintiff's employment, effective July 15, 1992.

IV. STIPULATIONS

1. Plaintiff is a black male citizen of the State of Colorado and a resident of El Paso County.

2. Defendant is a Delaware corporation registered to do business in the State of Colorado.

3. Defendant hired Plaintiff as a Baker on or about November 18, 1981.

4. On June 2, 1992, Plaintiff left his place of employment at his lunch hour.

5. Defendant placed Plaintiff on suspension on or about June 5, 1992, without pay.

6. Defendant terminated Plaintiff's employment effective July 15, 1992.

V. PENDING MOTIONS

Defendant's Motion for an Order Dismissing the Action With Prejudice For Failure to Comply With Court Order and For Failure to Prosecute, filed March 30, 1995, is currently pending.

Defendant's Motion for Summary Judgment, filed December 14, 1995, is currently pending.

VI. WITNESSES

A. Plaintiff's non-expert witnesses:

1. Plaintiff will definitely call the following witnesses:

1. Greg Harsdh, 7235 Woody Cruch, Colorado Springs, Colorado 80911, (719)528-6385.
2. John William, 103 Howard, Ft. Collins, Colorado 80525, (970)226-6654.
3. Jackson J., 455 E. Cheyenne Mt. Blvd., Colorado Springs, Colorado 80906, (719)576-3310.
4. Olvey S. Kent, MD, 1519 E. Boulder, Colorado Springs, Colorado, (719)471-2204.
5. Cantor Avrim DO PC, 2140 Academy Cir., Colorado Springs, Colorado, (719)597-4200.
6. Cynthia F. Renkel, 600 17th St., 3rd Floor, South Tower, Denver, Colorado 80202-5433.

7. Wayne Brewer, 2101 W. 52nd Avenue, Denver, Colorado 80221, (303)458-0621.
8. Phyllis King, 5520 US Hwy 85 & 87, Scrty, Colorado Springs, Colorado 80911, (719)392-9079.
9. Mike Templeton, 103 W. Howard, Ft. Collins, Colorado 80525, (970)226-6654.
10. Keith Harding, 4570 Hilton Pkwy., Suite 102, Colorado Springs, Colorado 80907, (719) 528-1571.

2. **Plaintiff may call the following witnesses:** None.

B. **Plaintiff's expert witnesses:** Plaintiff states that he intends to call an economist to testify about Plaintiff's claimed damages.

C. **Defendant's non-expert witnesses:**

1. **Defendant will call the following witnesses:**
   1. Pat Hildebrand, 2750 Tower Road, Aurora, Colorado 80011, (303)360-4300.
   2. William Winters, 210 Hargrove Court, Colorado Springs, Colorado 80906, (719)576-3310.
   3. Russell Weiant, 6865 Palmer Park, Colorado Springs, Colorado 80915, (719)598-8302.
   4. Karl Quintana, 5795 Southmoor Drive, #45, Colorado Springs, Colorado 80910, (719)391-0465.
   5. Mike Schwarzkopf, 3018 East Parkriver, Boise, Idaho 83706, (208)336-3133.

6. Deputy Doug Kelton, Investigations Division, El Paso County Sheriff's Office, 15 East Cucharras Street, Colorado Springs, Colorado 80903, (719)520-7110.
7. Deputy Donnie Richter, Fugitive Apprehension Unit, El Paso County Sheriff's Office, 15 East Cucharras Street, Colorado Springs, Colorado 80903, (719)520-7105.

2. **Defendant may call the following witnesses:**
   1. Judy Johnson, 518 Jersey Lane, Security, Colorado 80911, (719)392-9079.
   2. Patti Curry, 567 North 800 East, Layton, Utah 84041, (801)773-9240.
   3. Pat Campbell, 6511 East 89th Place, Tulsa, Oklahoma 74113, (918)621-6500.
   4. Ron Harris, 139 Crystal Hills Boulevard, Manitou Springs, Colorado 80829, (719)597-7601.
   5. John Mosiman, 1222 Sherwood Lane, Colorado Springs, Colorado 80906, (719)392-2229.
   6. Karen Freckleton, Albertson's, Inc., 250 Parkcenter Boulevard, Box 20, Boise, Idaho 83726, (208)385-6200.
   7. Pam Tompkins, 7495 Cabin Ridge Drive, Colorado Springs, Colorado 80911, (719)390-0816.
   8. Jacqueline Johnson, 1430 Keith Drive, Colorado Springs, Colorado 80916, (719)380-9109.

9. Kari Calu (Wheeler), 1723 Wooten Road, Colorado Springs, Colorado 80915, (719)528-7004.
10. Weston Pauling, 4945 Mark Dabling, Colorado Springs, Colorado 80919, (719)548-9625.
11. Joe Maestas, 2201 W. 52nd Avenue, Denver, Colorado 80221, (303)458-0621.
12. Wayne Brewer, 2201 W. 52nd Avenue, Denver, Colorado 80221, (303)458-0621.
13. Cheryl Richardson, 8160 Contrail Drive, Colorado Springs, Colorado 80920.
14. Robert Richardson, 8160 Contrail Drive, Colorado Springs, Colorado 80920.
15. Any witness identified by Plaintiff.
16. Any witnesses necessary for authentication of documents.
17. Any witness necessary for rebuttal and/or impeachment.

D. Defendant's expert witnesses: If this Court permits Plaintiff to call an economist, Defendant will call an economist. Otherwise, none.

VII. EXHIBITS

A. Plaintiff's exhibits:

1. ADA Handbook.
2. Bakery Agreement between Albertson's, Inc. #858 and Bakery, Confectionery and Tobacco Workers' International Union, Local #26, Denver, Colorado.
3. Referee's Decision, dated November 20, 1992.

4. New Patient Evaluation, dated September 10, 1990, by S. Kent Olvey, M.D., together with various medical reports.
5. Affidavit of Wayne Brewer of Bakery, Confectionery & Tobacco Workers Local No. 26, dated August 16, 1995.
6. Discharge Summary, dated November 26, 1986, from Memorial Hospital, Colorado Springs, Colorado, together with various reports.
7. Letter, dated February 25, 1992, from NLRB to Albertson's, Inc.
8. Letter, dated December 3, 1992, from John P. Bowen to NLRB.
9. Letter, dated June 5, 1992, from NLRB to Plaintiff.
10. Letter, dated June 18, 1993, from Albertson's, Inc., to Wayne Brewer of Bakery, Confectionery & Tobacco Workers Local No. 26, with attachments.
11. Letter, dated July 9, 1992, from Bakery, Confectionery & Tobacco Workers Local No. 26 to Robert Richardson.
12. Letter, dated November 2, 1992, from Joe D. Maestas to Albertson's, Inc.
13. Letter, dated June 24, 1992, from Joe D. Maestas to Albertson's, Inc.
14. Letter, dated February 8, 1993, from Wayne Brewer to Albertson's, Inc., with attachments.
15. Grievance Form, dated June 24, 1992, filed by Plaintiff with Bakery, Confectionery & Tobacco Workers Local No. 26.
16. Letter, dated December 3, 1992, from Wayne Brewer to Albertson's, Inc.

17. Letter, dated February 8, 1993, from Wayne Brewer to Plaintiff.
18. Letter, dated February 23, 1993, from Wayne Brewer to Plaintiff.
19. Letter, dated July 1, 1993, from Wayne Brewer to Albertson's, Inc.
20. Complaint. Bakery, Confectionery & Tobacco Workers, Local No. 26 v. Albertson's, Incorporated.
21. Arbitrator's Opinion and Award, dated January 18, 1984, concerning "Richardson Termination."
22. Arbitrator's Opinion and Award, dated July 26, 1984, concerning "Richardson Termination--Compliance Hearing."
23. Arbitrator's Second Compliance Award, dated November 12, 1984.
24. Employee Status Report of Robert Richardson.
25. Employee Status Report of Pam Albright.
26. Employee Status Report of Greg Gallegos.
27. Employee Status Report of Kent Brandenburg.
28. Employee Status Report of Michelle Bouchard.
29. Employee Status Report of Dave Onley.
30. Employee Status Report of Brandon Baker.
31. Summary of Arbitrator's Award, dated May 31, 1994, from John P. Bowen regarding King Soopers.
32. Copy of article regarding Wagner Act.

B. **Defendant's exhibits:**

1. Documents identified as Deposition Exhibits to the extent admissible as evidence.

2. Documents exchanged pursuant to Fed. R. Civ. P. 26(a) or in discovery to the extent admissible as evidence.
3. Documents provided by EEOC pursuant to Albertson's Freedom of Information Act request to the extent admissible as evidence.
4. Copy of Summons and Complaint, Case No. 5 R 93 004694, and related materials.
5. Copy of Summons and Complaint, Case No. 5 T 93 001128, and related materials.
6. Copy of Summons and Complaint, Case No. 5 T 93 018552, and related materials.
7. Copy of Summons and Complaint, Case No. 5 T 92 000571, and related materials.
8. Copy of Summons and Complaint, Case No. 5 T 91 017975, and related materials.
9. Copy of Summons and Complaint, Case No. 5 R 92 000038, and related materials.
10. Copy of Summons and Complaint, Case No. 5 T 91 019656, and related materials.
11. Copy of Summons and Complaint, Case No. 5 R 91 005860, and related materials.
12. Copy of Summons and Complaint, Case No. 5 T 90 015301, and related materials.
13. Colorado identification card for Robert Richardson.
14. Albertson's Statement of Compliance, signed by Plaintiff on November 16, 1981.
15. Albertson's Company Personnel Policies, signed by Plaintiff on November 16, 1981.
16. Albertson's Company Personnel Policies, signed by Plaintiff on November 30, 1984.
17. June 25, 1992, letter from Mike Schwarzkopf to Plaintiff.

18. Richardson's Grievance Form Filed with the Bakery, Confectionery and Tobacco Workers' International Union, Local No. 26.
19. Handwritten letter by Plaintiff to Mr. Schwarzkopf, date stamped July 15, 1992, with attachments.
20. July 14, 1992, letter from Karen Freckleton to Mr. Richardson.
21. Collective Bargaining Agreement, dated July 15, 1991, between Albertson's No. 858 and Bakery, Confectionery and Tobacco Workers' International Union, Local No. 26.
22. EEOC Charge No. 320931528.
23. EEOC Determination Regarding Charge No. 320931528.
24. EEOC Charge No. 081831119.
25. EEOC Determination Regarding Charge No. 081831119.
26. Charge of Discrimination, Colorado Civil Rights Division, dated December 12, 1988.
27. Charge of Discrimination, Colorado Civil Rights Division, dated January 26, 1989.
28. EEOC Determination Regarding Charge Nos. 320890563 and 320890349.
29. Handwritten Notes from Plaintiff to EEOC.
30. Transcript of Testimony from November 2, 1992, Hearing before Industrial Claims Appeals Office.
31. Referee's Decision, dated November 20, 1992.
32. October 22, 1993, letter from Mr. Feldman to Plaintiff.
33. Plaintiff's Complaint.

34. Plaintiff's Responses to Defendant's First Set of Requests for Production of Documents and Interrogatories.
35. Affidavit of William Winters, dated October 15, 1993.
36. Handwritten Statement of William Winters.
37. Handwritten Statement of Russell Weiant, dated June 4, 1992.
38. Handwritten Statement of Karl Quintana, dated June 4, 1992.
39. Handwritten Statement of Weston Pauling, dated June 4, 1992.
40. Handwritten Statement by Plaintiff to EEOC, dated March 25, 1993.
41. Plaintiff's letter to EEOC, dated January 3, 1994.
42. Copies of prior charges, complaints and grievances filed or brought by Plaintiff against Albertson's.
43. Copies of warnings, reprimands, and "write ups" issued to Plaintiff and other employees.
44. Copies of comparable doctor's certificates provided by other Albertson's employees.
45. Documents contained in Plaintiff's personnel file.
46. Any exhibit identified by Plaintiff.
47. Any exhibit necessary for rebuttal or impeachment.
48. Summaries, charts, or diagrams based on evidence or documents already identified.

Copies of exhibits must be provided to opposing counsel no later than the Status Conference referred to in Section XII(b).

VIII. DISCOVERY

Except for those issues raised in Defendant's Motion for an Order Dismissing the Action With Prejudice for Failure to Comply With Court Order and for Failure to Prosecute, discovery has been completed.

IX. SPECIAL ISSUES

Plaintiff indicated, in a document Albertson's counsel received December 1, 1995, that he intended to call an economist to testify about his claimed damages. This was the first time Defendant learned that Plaintiff intended to call an economics expert. Plaintiff, however, has not provided Defendant with an expert report or any information mandated by Fed. R. Civ. P. 26(a)(2). Defendant opposes Plaintiff's attempt to call an economics expert, as the deadline for exchanging expert reports was April 24, 1995. In addition, Plaintiff never submitted the Rule 26(a)(2) materials within the time frame set forth in that Rule. In the alternative, Defendant asks for an extension of time to file its Rule 26(a)(2) materials.

X. OFFER OF JUDGMENT

Counsel acknowledge familiarity with the provisions of Rule 68, Federal Rules of Civil Procedure (Offer of Judgment), and have discussed it with the clients against whom claims are made in this case.

XI. EFFECT OF PRE-TRIAL ORDER

A. Counsel acknowledge familiarity with the provisions of Rule 16, Federal Rules of Civil Procedure (Pre-Trial Procedures; Formatting Issues).

B. Hereafter, this Order will control the subsequent course of this action and the trial and may not be amended except by consent of the parties and approval by the Court or by Order of the Court to prevent manifest injustice. The pleadings will be deemed merged herein, and in the event of ambiguity in any provision of this Order, reference may be made to the records of the Pre-Trial Conference to the extent reported by stenographic notes and to the pleadings.

XII. TRIAL AND ESTIMATED TRIAL TIME: STATUS CONFERENCE

A. The parties believe that the trial in this case will take four to five days to complete.

B. A final trial preparation conference will be held by the Court on Friday, January 12, 1996, at 8:00 a.m. At the final trial preparation conference, counsel are directed to file final lists of all exhibits and witnesses. The Court may also consider motions in limine, if any, on particular issues and other matters to expedite the trial.

XIII. SETTLEMENT

In preparation for the final trial preparation conference, the parties shall take a fresh look at settlement prospects and advise the Court of those prospects at the conference.

PULMONARY ASSOCIATES
Michael J. Ansfield, M.D.
Stephen C. Telatnik, M.D., P.C.
Allan B. Davidson, M.D.
S. Kent Olvey, M.D., P.C.

RICHARDSON, ROBERT 10-1-90

Mr. Richardson comes in today for follow-up of his bronchospasm and cough. With the Ventolin metered dose inhaler he has done much better. Studies done at Penrose since last visit are notable for pulmonary functions with small airway obstruction which improves with bronchodilator by 17% in the $FEV_{25/75}$ category. His CBC, chest x-ray, upper GI, and barium swallow were normal.

On exam today, blood pressure 117/70. Chest clear. Heart regular without murmurs or gallops, lifts, thrusts, or heaves. Extremities - no clubbing, cyanosis, or edema.

PLAN: Continue the Ventolin metered dose inhaler. We discussed this at length. No return visit was given. He can return p.r.n.

S. KENT OLVEY, M.D./pm

NEW PATIENT EVALUATION

PATIENT: RICHARDSON, ROBERT
DATE: 9-10-90

HISTORY OF PRESENT ILLNESS: Mr. Richardson is a 40-year-old male who presents for evaluation of shortness of breath, dyspnea on exertion, and wheezing, with some cough producing white phlegm. He has had this on and off for the last three years. In fact, about three years ago he had an episode so bad that he was put in the hospital after having presented to the E.R. with these symptoms. Apparently, he experienced an allergic reaction to epinephrine.

He currently takes no medications for this apparent asthmatic condition and he presents now for evaluation because it has recurred and is more bothersome to him than before.

SOCIAL AND FAMILY HISTORY: Negative. He is allergic to no medicines and is a nonsmoker.

He takes no medicines currently on a regular basis.

PAST HISTORY: Medical and surgical history is negative except for the asthmatic episode approximately three years ago, as outlined above.

The patient works as a baker and is not exposed to any unusual toxins in his profession. One significant

exposure is to multiple chemical agents, including agent orange in Viet Nam in the 1970s.

GENERAL REVIEW OF SYSTEMS: Other than as outlined above, notable only for occasional low back pain which is probably secondary to musculoskeletal strain from his profession.

PHYSICAL EXAMINATION: BP 110/80. Saturation on room air was 93% with an 85 heart rate. Head normocephalic, atraumatic. Neck supple without node or mass. Chest clear. Heart regular without murmurs or gallops, lifts, thrusts, or heaves. Abdomen soft; bowel sounds present without masses or organomegaly. Extremities - no edema. Gross neurologic for mental status, motor and sensory was physiologic.

IMPRESSION: 1. Cough with bronchospasm. This is probably an allergic or asthmatic phenomenon, although he does give a history to support esophageal acid reflux. He does not give a history for heart failure nor does he give a history to support sinusitis.

PLAN: Obtain complete pulmonary function tests, upper GI and barium swallow and CBC. A sample of Ventolin metered dose inhaler was given as well as a prescription. I have asked him to follow-up in about 3-4 weeks after he has had a chance to try the Ventolin and obtain the studies outlined above. I suspect we will find asthma on the pulmonary function tests and we will be able to continue the inhaler and perhaps start on oral medication if necessary. NOTE. The chest x-ray that he brings with him is negative.

S. KENT OLVEY, M.D.

SKO:pm